United Insurance Company of America *and* United Food and Commercial Workers International Union, AFL–CIO, CLC. Cases 12–CA–19979 and 12–CA–20016

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On March 6, 2000, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Michael Maiman, Esq., for the General Counsel.
Michael I. Richardson, Esq., for the Respondent.
R. David Stocks, Representative, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an issuance of warnings and placing on probation case. At the close of trial proceedings conducted in Tampa, Florida, on February 10 and 11, 2000, and after reviewing pretrial briefs and hearing oral argument by counsel for the General Counsel (Government counsel) and counsel for United Insurance Company of America (Company counsel), I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations, setting forth findings of fact and conclusions of law, including my ultimate conclusion that the complaint lacked merit and should be dismissed.

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found the Company did not violate the National Labor Relations Act (the Act) when on or about December 28, 1998, it issued warning notices to its employees Edward C. (Bud) Russell and Jeffery Lastinger, placed them on probation for 1 year and prohibited them from participation in company incentive recognition such as regional trips and the president's club. Accordingly, I dismissed the complaint.

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 366 to 396, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

Exceptions may now be filed in accordance with Section 102.46 of the National Labor Relations Board's Rules and Regulations, but if they are not timely or properly filed, Section 102.48 provides that my Bench Decision shall automatically become the National Labor Relations Board's Decision and Order.

CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has not violated the Act in any manner alleged in the complaint.

On these conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

APPENDIX A

BENCH DECISION

366

JUDGE CATES: On the record.

WILLIAM N. CATES, Administrative Law Judge. I heard these cases in trial proceedings conducted in Tampa, Florida, on February 10 and 11, 2000.

I have heard oral argument by Government counsel and Company counsel. I received pretrial briefs from Government counsel and Company counsel, which I have considered.

I am issuing this Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations. In so doing, I shall set forth findings of fact and conclusions of law.

These cases are in the matter of United Insurance Company of America, hereinafter the Company, and United Food and Commercial Workers International Union, AFL–CIO, CLC, hereinafter the Union, in Cases 12–CA–19979 and 12–CA–20016.

These are unfair labor practice cases prosecuted by the National Labor Relations Board's General Counsel, acting through the Regional Director for Region 12 of the National Labor Relations Board, hereinafter Board, following an investigation by Region 12's staff.

The Regional Director for Region 12 of the Board issued an Order Consolidating Cases, Consolidated

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in the attached appendix B. [Omitted from publication.]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

367

Complaint and Notice of Hearing, hereinafter Complaint, on September 29, 1999, against the Company based on unfair labor practice charges filed by the Union in Case 12–CA–19979 on March 10, 1999, and in Case 12–CA–20016 on March 22, 1999.

The charge in Case 12–CA–19979 was amended on July 28, 1999, and the charge in Case 12–CA–20016 was amended on June 17, 1999 and again on July 28, 1999.

Specifically, the Complaint alleges the Company issued warning notices to its employees Edward C. (Bud) Russell, hereinafter Russell, and Jeffrey Lastinger, hereinafter Lastinger, and placed these two employees on probation for one year effective from December 3, 1998, to December 3, 1999, and prohibited these two employees from participating in Company incentive recognition programs such as Company regional trips and the Company's President's Club.

It is alleged the Company took the action it did against these two employees because Russell and Lastinger joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

It is also alleged the Company took the action it did against these two employees because they gave testimony to the Board in the form of affidavits, and

368

because Lastinger filed an unfair labor practice charge against the Company in Case 12–CA–19391.

It is alleged the Company's actions constitute unfair labor practices within the meaning of Section 8(a)(1), (3) and (4) of the National Labor Relations Act, as amended, hereinafter Act.

In its answer to the complaint, as well as admissions made at trial, the Company admits the Board's jurisdiction is properly invoked and that the Union is a labor organization within the meaning of the Act.

Specifically it is admitted the Company is an Illinois corporation with offices and places of business located throughout the United States, including an office and place of business located at all material times herein, until on or about October 1998, in St. Petersburg, Florida, and at all material times since on or about October 1998, in Bradenton, Florida, herein called the St. Petersburg District Office, and has been engaged in the sales and servicing of insurance products.

During the twelve months preceding the issuance of the Complaint herein, the Company, in conducting its business operations, derived gross revenues in excess of $500,000.

369

During that same time, the Company purchased and received at its statewide Florida facilities, goods valued in excess of $50,000 directly from points outside the State of Florida.

The evidence establishes the parties admit and I find the Company is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The evidence establishes, the parties admit, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

This case, as in most cases, requires some credibility resolutions or, stated somewhat differently, I will rely on certain testimony, a result of which will be to reject other testimony.

In arriving at my credibility resolutions, I carefully observed the witnesses as they testified, and I have utilized such in arriving at the facts herein. I have also considered each witness' testimony in relation to other witness' testimony and in light of exhibits presented here.

If there is any evidence that might seem to contradict the credited facts I set forth, I have not ignored such evidence but, rather, have discredited or rejected it as not reliable or trustworthy. I have

370

considered the entire record in arriving at the facts here.

There are certain facts somewhat of a background nature and some of a more essential nature that for the greater part are not disputed in this case.

First, the two individuals, of whom it is alleged that the Company committed unfair labor practices against, are both long term, exemplary employees of the Company.

It is also undisputed that both of these individuals, meaning Russell and Lastinger, supported the Union's efforts at the Company. Both were known to management to have supported the Union.

And more specifically, District Manager O'Brian specifically knew of both employees' support for the Union.

The Company knew, as well as District Manager O'Brian, in particular, that Lastinger had filed a National Labor Relations Board type unfair labor practice charge against the Company as an individual, and that case was settled with the settlement agreement being approved by the Regional Director for Region 12 of the Board on or about September 2, 1998.

It is also undisputed that the Union activity, either in the form of organizational activity or

371

related types of activity, or negotiating relations between the Company and the Union has been commenced and/or ongoing at all times material to this case. The crux of the case is centered around or revolves from two pieces of business, meaning insurance type business, that was generated by and/or involved the two individuals named as alleged discriminatees in the Complaint, namely Russell and Lastinger.

Those will be dealt with in length as we proceed through the facts of the case.

Again, before I get into more specific Union related activities by the two individuals, it is undisputed on this record that Lastinger is the one who brought the Union involvement to the Company, and that he did so, based on his testimony, in either late 1996 or early 1997.

Further, it is without issue, based on General Counsel Exhibit Number 2, that a Certification of Representative issued for the applicable employees herein by the Regional Director for Region 12 of the Board on February 26th, 1998.

Further, as I indicated earlier, it is undisputed that Lastinger filed a charge against the Company as an individual in Case 12–CA–19391, which was settled, and the Regional Director approved the settlement on

372

September 2, 1998.

Further, it is undisputed that Russell was and continues to be on the Union negotiating committee that is negotiating or attempting to negotiate an agreement between the Company and the Union for the employees herein.

It is likewise undisputed that the two individuals involved herein were notified on December the 28th, 1998 that they had been placed on probation for one year, effective from December 3, 1998 to December 3, 1999.

Although further stipulated to by the parties that the individuals had Union activity and that the Company was aware of that activity, I shall highlight some of the additional evidence that indicates the individuals' support of the Union and the Company's knowledge of that.

I have already made reference to certain of Lastinger's testimony and/or exhibits with respect to his Union activities.

Further indications of the knowledge of the Union activities of Lastinger is demonstrated by a meeting Lastinger had with District Manager O'Brian that took place sometime after Lastinger returned to work from disability.

373

Lastinger testified he went on disability June 11, 1997. He had a heart attack on or about June 13, 1997, but returned to work on or about September 15, 1997.

Upon his return to work, he and District Manager O'Brian had a meeting in which District Manager O'Brian suggested certain work Lastinger could take, the job that he previously had, or he would offer him the work in and around the Arcadia, Florida area, which was a block of work referred to sometimes in this trial as a book of work that would cover a larger area and be more revenue generating than he previously had.

Either in that meeting or one that happened shortly thereafter, District Manager O'Brian stated to Lastinger that with his heart attack he, perhaps, should not be shop steward for the Union, that he might want to find some position or job that had less tension with it.

As I have noted earlier, Russell had involvement with the Union that the Company stipulates knowledge about. Most particular is Russell's involvement on the Union's negotiating committee. Further, Russell and District Manager O'Brian had a conversation that perhaps took place in early 1998, in

374

which the two of them discussed various items about the operation, function and procedures of the Company, and how the Company and its employees should be focused.

And in that meeting, District Manager O'Brian indicated that under a worse case scenario, the Company President might well close the St. Petersburg District Office, or that the Union could go on a strike.

So it is clear beyond question that the two individuals herein had Union activity and the Company was fully aware of that Union activity.

It is likewise certain the Company knew and was fully aware that a charge had been filed by Lastinger and that the charge was processed through the Board's normal processes until it reached a settlement on the dates I have previously indicated.

Next I turn to the somewhat critical facts that brought us to the place where we are today. Those facts first came to light, perhaps, on or about the first part of October 1998, perhaps specifically on or about October the 8th, 1998, when two pieces of business for the Company came to the attention of management that gives rise to the case herein.

I shall start with the Company's version of that particular meeting, simply because there was no one

375

present that was not from the Company in either a management's position or as a clerical, which I believe was excluded from the appropriate unit.

On or about that time in October of 1998, the Company, based on the testimony of District Manager O'Brian, was in a bit of turmoil for a number of reasons.

One was that they were short of support or clerical staff personnel. They previously had two employees, at least, if not more working in the office, one being a Ms. Rhodes, and the other perhaps being an employee by the name of Janis.

One of those employees left the employment of the Company and it left essentially Ms. Rhodes taking care of the paper work in the office.

The Company was also in the process or in the planning stages, or perhaps even in the accomplishment stages of moving their office from St. Petersburg, Florida, to someplace south of here.

At any rate, District Manager O'Brian observed on that date that Ms. Rhodes was getting behind in the amount of work she had to do that day.

And so District Manager O'Brian, as was his

376

practice, asked if he could help or assist his office manager specifically referring to Ms. Rhodes—and she indicated that, yes, he could.

It ended up that District Manager O'Brian was doing perhaps the simplest or easiest task to be performed in the office. He was simply putting together policies with a copy of the application for those policies.

The procedure at this Company, when business is generated, is that two copies of the application, or at least two copies of the application are brought into the Company.

One copy of the application is sent to the Company's Home Office in Chicago, while a copy is retained in the office files in the District Office.

Once the Company has approved and actually issued the policy, that policy is returned, usually on a Monday or a Wednesday, back to the St. Petersburg District Office.

And it is the office practice to then get the remaining copy of the application, place it with the policy, and put both pieces of information in the agent's box that actually generated or wrote the business.

District Manager O'Brian testified he was

377

doing specifically that on the day in question, and noted, when putting the application for insurance coverage on the contents of a home, a mobile home in this case for Lastinger's home, he noticed it was signed by Russell, and Russell had indicated he had taken the action that appeared below his signature.

O'Brian testified he knew that Lastinger's mobile home was a five wheel mobile home. He also testified he knew that it was out of the city or built up municipal area, and was out in a less populated area.

And so that caused him to flag or set aside the policy and the application that was referring to the insurance coverage for the contents of the home owned by Lastinger.

District Manager O'Brian stated that further in his placing the applications for insurance with the actual policies that had been issued, he noted a policy that had been written on the life of Robert Lastinger, which was the father of the Lastinger that is involved herein.

District Manager O'Brian testified he knew that the father had health problems, and he knew that from more than one source. That Agent Lastinger

378

had stated, at least on one occasion that he had the same type heart problems his father had.

Also, he knew that a previous policy had been issued involving the father, the elder Lastinger, that had indicated on the policy itself that he had problems that would warrant a special type of policy being issued.

The previous type policy was referred to as a graded death benefit life insurance policy. So he knew for those reasons Agent Lastinger should have noted on the application for policy, or at least attached a supporting document to indicate that the father, the elder Lastinger, had a health problem so that the Company could fully evaluate whether they wanted to insure this risk or not.

Because the policy that he was matching up with the application on October 8, was a whole life policy that made no indication of any health conditions or problems that would cause the Company not to issue a whole life unrestricted policy O'Brian was concerned.

District Manager O'Brian testified he called the Home Office of the Company and spoke with Bill Koski, and asked him for guidance on what should be done with respect to what he perceived were irregularities in these two pieces of business.

379

He testified that in both cases Koski recommended and/or directed he obtain additional information in the form of statements from the agents, specifically from Lastinger about the status surrounding his father.

And from Russell whether, in fact, he had seen the property, meaning the five wheeler mobile home that Lastinger was living in on the day the application was prepared, and whether he knew if it was, in fact, a mobile home or a home of some other nature.

The individual that District Manager O'Brian spoke with, namely Bill Koski, at the time in question was the Vice President of Consumer Affairs for the Company, and also sat as one of approximately five or six members on the Market Conduct Committee.

The evidence establishes the Company has a Market Conduct Committee that from time-to-time and perhaps once a week reviews business that has been written by various agents in all States that this Company does business in to ascertain if there has been compliance with the rules, guidelines and instructions of the Company with respect to good business for the Company.

That is, whether the agents in the field are

380

applying the standards and requirements and good business practices that the Company, its officers, and officials, and stockholders would want to take place.

The matter of the life insurance policy on the elder Lastinger, and the insuring for casualty loss the contents of Lastinger's mobile home, were reviewed by the committee in Chicago after the applications and related information that was sought was provided to the Market Conduct Committee in Chicago.

That committee specifically felt that the guidelines, instructions and operating procedures of the Company had not been followed by Agents Russell and Lastinger, and it placed the employees on probation for one year, effective from December 3, 1998 until December 3, 1999.

Specifically, Russell was placed on probation for one year for his involvement in signing the application for coverage for the contents of Lastinger's mobile home.

The Company found Russell had signed beneath the following comments:

> "I, a certified Company representative, hereby confirm that I have inspected the property to be insured and it is in compliance with underwriting guidelines.

381

> "I have asked the above questions of the proposed insured at the described location and have accurately recorded the responses."

The Company committee determined that could not have been accurate because Russell knew Lastinger lived in a five wheel mobile home and there's no mention of that fact, and that he knew the home was not located in the class district that was listed on the application for coverage.

Lastinger was placed on probation by the committee because he had processed an application for life insurance on his father as a whole life insurance policy, without notation that his father had in the past been issued a graded death benefit insurance policy, and he knew his father had health related problems with no history of that appended to the application or otherwise made known to the Company.

The committee, having made those determinations prepared letters to both of the individuals and dated them December 3, 1998.

Russell's letter, which was presented to him on December 28th, 1998, reads in pertinent part:

"This letter is notification that you are being placed on probation for a period of one year, December 3, 1998 through December 3, 1999, for a violation of

382

Rule Number 1C of the Company's Market Conduct Rules.

"Probation will also include prohibition from Company incentive recognition, such as Regional Trips and President's Club.

"It is very important that all of the company underwriting rules and other company requirements are followed. Failure to adhere to them in the future, could result in termination of employment."

And that was signed by Regional Vice President G. E. MacDonald.

Lastinger's letter of the same date, given to him likewise on December the 28th, 1998 reads in pertinent part:

"This letter is notification that you are being placed on probation for a period of 1 year, December 3, 1998 through December 3, 1999, for a violation of Rule Number 1G and 1L Company's Market Conduct Rules.

"Probation will also include prohibition from Company incentive recognition, such as Regional Trips and President's Club.

"It is very important that all of the company underwriting rules and other company requirements are followed. Failure to adhere to them in the future, could result in the termination of employment."

383

A brief meeting was had between Russell, Lastinger, District Manager O'Brian and a Mr. Murray on December the 28th, at which the two individuals were informed that disciplinary action was being taken against them in the form I have just indicated, and they were so notified.

Those are the facts that establish the framework for the case herein.

Before I go further and delve deeper into the individual testimony of the two individuals and the responding action by the Company, let me state the legal principals which I will be applying in this case and how I will arrive at the conclusions I do, based on an application of facts and legal principles.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the Board set forth its causation test alleging violations of the Act that turn, as does the case herein, on employer motivation.

This causation test applies to Section 8(a)(4) allegations, as well as Section 8(a)(1) and (3) allegations.

384

Under this test, the Government must persuade the Board that antiunion sentiment and/or charge filing and related activities were substantial or motivating factors in the challenged employer conduct or decision.

Once this is established, the burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even if its employees had not engaged in protected activity.

See *Manno Electric, Inc*., 321 NLRB 278 fn. 12 (1996).

How does the Government establish its burden? Government counsel must demonstrate by a preponderance of evidence that the employees were engaged in protected activity, that the Employer was aware of the activity, that the activity or the worker's union affiliation or charge filing activities were a substantial or motivating reason for the employers action, and there was a causal connection between the employer's animus and its disciplinary decision.

The Government may meet its *Wright Line* burden with evidence short of direct evidence of motivation. For example, inferential evidence arising form a variety of circumstances, such as union animus, timing or pretext may sustain the Government's burden.

385

Furthermore, it may be found that where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct testimony or evidence of motivation, the trier of fact may infer unlawful motivation.

Shattuck Dean Mining Corp. v. NLRB, 362 F.2d 466 at 470 (9th Cir. 1996), *Flour Daniel, Inc*., 304 NLRB 970 (1991).

Motivation of union animus may be inferred from the record as a whole where an employer's proffered explanation is implausible or a combination of factors support circumstantially such an inference.

Union Tribute Co. v. NLRB, 1 F.3d 486 at 490 to 492 (7th Cir. 1993).

Direct evidence of Union animus is not required to support such an inference.

NLRB v. 50-White Freight Lines, Inc., 969 F.2d 401 (7th Cir. 1992).

The Government, in this case, contends that it should prevail on at least one of three, if not all three, stated reasons.

The Government contends Russell and Lastinger were specifically selected for the discipline they received because of their union activities.

Further, the Government contends the reasons

386

advanced by the Company were simply a pretext for the actions they took against the individuals.

And thirdly, that they have met their burden under *Wright Line* and that the Company has failed to demonstrate it would have taken the action it did, even in the absence of any protected conduct on the part of the individuals involved.

The Company, on the other hand, urges the *Wright Line* analysis is appropriate, that certain elements of the *Wright Line* requirements that the Government has to meet have been met, such as the individuals involvement in union activity, that the Company was aware of it and adverse actions were taken against the two individuals. But the Company contends the Government's case comes apart at that point.

That it has demonstrated it would have taken the action it did with respect to the discipline herein, even if an initial case has been established by the Government.

Did the Government establish a prima facia case here? And I recognize that certain of the most recent Board cases have quit using the word prima facia and have spoken only in terms of the Government meeting its burden.

387

Whichever way I refer to it in this case, I am referring to an application of the *Wright Line* analysis regardless of what I refer to it as.

I am fully persuaded the Government initially met its burden.

The Government established that both of the individuals herein were involved in union activity and that Lastinger was also involved in charge filing against this Company.

There is no question, based on the facts I've outlined above, the Company knew of the union and charge filing activities of these two individuals.

It is also noted that the timing between the filing of the charge and the settling of the case by Lastinger is critical. The settlement in Case 12–CA–19391, was approved on September 2, 1998. The timing between that approval and the action that was taken against Lastinger and Russell happened shortly thereafter.

Or the events that started in motion had their genesis shortly thereafter. There is no question that there was adverse action taken against the two individuals.

They were placed on probation for one year, and

388

they missed whatever belonging to the President's Club and regional trips entails. This record is silent as to what the President's Club and the regional trips involve. I need not reach what they involve to decide the merits of this case.

Was there evidence the Company was motivated at least in part by the activities of these two individuals?

I'm persuaded the Government met its burden on that point for, among other reasons, the Company knew Lastinger had brought the Union in.

The Company knew Russell was on the negotiating committee and was a visible and vocal supporter of the Union.

The Company had indicated, through District Manager O'Brian, that under the worst set of circumstances, the Company could decide to simply close its St. Petersburg facility and noted also that the Union could go on strike and bring about the demise of this particular facility.

So I'm persuaded the Government met its burden of establishing a violation of the Act as far as it is required to go to shift the burden to the Company, to either come forward with an affirmative defense or lose the case.

389

Did the Company come forward with an affirmative defense that would indicate it would have taken the action it did, even in the absence of the protected conduct on the two individuals involved?

Before I answer that question, it is appropriate to look at the documents and the testimony that centered around or gave rise to the Company taking the action it did.

First, I shall start by looking at the documentation that gave rise to the discipline that was administered against Russell.

Specifically, I am referring to General Counsel Exhibit 14, which is the casualty insurance application for the contents of Lastinger's mobile home.

Agent Russell testified that he signed the document in question, doesn't dispute it. He testified the only thing he was doing by signing it was he was witnessing the signature of the insured. That is in this case, Lastinger, and that was all he was doing.

He testified that was the procedure the Company followed when an agent was insuring property of the agent's own holding, and he denied familiarity with a number of rules or regulations that might govern this type situation.

390

However, when shown certain of the Company's rules and regulations and guidelines, specifically the Underwriting Guide Book, which I think came into evidence as Company Exhibit 19, he acknowledged he recognized parts of it and that he had, perhaps, seen parts of it, but he had not seen it in the form that it was presented.

And notwithstanding that, he still believes his signing was simply to witness the other individual's signature.

District Manager O'Brian, on the other hand, testified the guidelines were clear that an individual signing in the manner that Agent Russell did, was actually underwriting the policy and that he had not only provided this information to all of the agents, which would include Russell, but that he had specifically read at employee meetings at which Russell, among others, attended, the actual rules and regulations of Monthly Home Service Insurance Plans, Riders, Premiums, Guidelines, which was referred to in Company Exhibit 16.

The question arises then as to, A, did Russell understand what he was signing and B, was he following Company policy when he signed the application for coverage for Lastinger's mobile home.

391

Russell readily admitted that he had not inspected the property on the day that he signed it, and that he wasn't sure whether it was a five wheel or a six wheel, but he did know that it was a mobile home.

I believe Lastinger testified that it was on blocks and that it sat near a pad, at least, if not on a pad.

Russell acknowledged that he was familiar with where the mobile home was placed and he knew that property had classifications, based on where it was physically located, and that those classifications would impact the rate that would be charged for coverage on such a piece of property.

I'm persuaded that Russell knew what he was doing because the testimony in this trial and the evidence tends to indicate that he is by far the most productive agent in this office.

And perhaps he's one of the most productive agents in the country for this insurance Company, which sells insurance of various nature to low to moderate level income individuals.

Notwithstanding Russell's protestations to the contrary, I'm persuaded that he knew the company's rules and regulations.

I'm convinced that an individual who can produce as

392

much as Russell can, and be the exemplary employee that he is and withstand a complete and full audit of his package containing, perhaps, 800 properties and millions of dollars of business, knows the rules and regulations.

And that he was familiar with them, and that he knew and understood when he signed as the licensed sales representative, he was signing in that capacity.

And that he knew that insurance coverage on a home such as Lastinger's was property that would well have a question as to whether it would be covered at least into the classification that was on the document that he attested he had reviewed by signing the document.

So I'm persuaded he signed with full knowledge that he was the licensed sales representative and that he had not seen the property on the date in question, and that he knew or should have known that the property was not properly classified.

Now, did District Manager O'Brian happen upon this information coincidentally or was he on a mission to seek out, search and find any information he could find on Russell and, for that matter, Lastinger, so he could take action against them because they had been involved with the Union or because they had filed

393

charges, or both combined together, or that he was in some manner seeking to punish or retaliate against these two individuals for the actions they had taken?

The evidence persuades me District Manager O'Brian was not on a mission to destroy the two individuals or to punish or to retaliate against them.

He testified that he helped out on the day in question only because Rhodes was over-burdened that day, that he had no way of knowing what policies or applications would be there, and that he was reviewing these simply because he was helping out in the office.

Rhodes testified she had no way of knowing what policies were coming in on any given day or what applications would be matched up with those.

That she was over-burdened that day, and that O'Brian performed tasks that required the least amount of effort.

And I'm persuaded that a clerical employee who was needing help, but who did not want to over-burden her superior would give him work that would required the least amount of office knowledge on his part to go into it.

So I'm persuaded that he came upon the fire policy coincidentally. That he observed it was in violation of the printed rules, the "read to the employee" rules,

394

and that he simply called William Koski for guidance.

And from that point on, the matter was taken up by the committee in the Home Office, and the discipline taken by the committee in the Home Office was based on the documents that were provided, the explanations that were given, and the rules under which this Company issues insurance through its agents.

Next I move to the matter for which Lastinger was disciplined and the situation that gave rise to his discipline.

Again the application for coverage, along with the policy, was placed together by District Manager O'Brian on the same occasion and in the same manner.

He discovered it. He knew that the younger Lastinger had heart problems because he had most recently returned from heart surgery.

He knew that in the past, the individual that was attempting to be covered had issued on him a graded death benefit insurance policy.

I reject the contention that somehow it made it lawful in this case because there was an intervening policy that was a whole life policy that was issued by the Company that was in effect for approximately a

395

year, that did not make mention or note that the elder Lastinger had a health problem.

I'm persuaded District Manager O'Brian, as he testified, would have no reason to come upon that unless he was in such a situation as someone providing him the information or he happened, by chance, to be putting applications and policies together and observed such.

So I'm persuaded that the policy and the application for a policy for life insurance on the elder Lastinger was forwarded to the Company committee in Chicago simply because District Manager O'Brian knew of the earlier health problems of the elder Lastinger, and he knew that he had been informed that the younger Lastinger had the same health problems that his father had.

I find again the policy and the application from which the discipline was taken against Lastinger was taken based on Company rules, policies and guidelines as determined by the Chicago committee, and it was not done in a manner by District Manager O'Brian or anyone else at the Company in retaliation for the actions of Lastinger and/or for that matter, Russell with respect to their Union or charge filing activities.

396

I further credit the testimony of O'Brian in light of all the evidence I have just outlined, that he was not motivated by nor had animus toward the two individuals involved in his finding the documents and forwarding them to the home office in Chicago.

I find the Company met its burden of establishing it would have taken the action it did, notwithstanding the Union or charge filing activities of the two individuals involved herein.

Having so concluded, I shall dismiss the Complaint in its entirety, and I so do.

I thank you for your attention.

It has been a pleasure being in Tampa, Florida, and this trial is closed.